

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID HIRSCH,

Defendant.

No. **CR02-4068 MWB**

REPORT AND RECOMMENDATION
ON MOTION TO DISMISS AND
ORDER ON MOTION FOR
DISCOVERY

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This matter is before the court on a motion and supporting brief (Doc. Nos. 9 & 10) filed by the defendant David Hirsch (“Hirsch”) seeking to dismiss the indictment in this case, or alternatively, if the indictment is not dismissed, to allow certain discovery relating to the charges against him. The plaintiff (the “Government”) has resisted the motion. (Doc. No. 12) Pursuant to the Trial Scheduling and Management Order (Doc. No. 6, entered Aug. 28, 2002), motions to dismiss in this case were assigned to the undersigned

United States Magistrate Judge for the filing of a report and recommended disposition. Neither party has requested a hearing or oral argument on the motion, and the court finds the same would not be of assistance in resolving the issues raised by Hirsch. Accordingly, the court turns to consideration of Hirsch's motion.

I. INTRODUCTION

On August 8, 2002, Hirsch was indicted by the grand jury on one count of making false statements to a court or grand jury in violation of 18 U.S.C. § 1623. (See Indictment, Doc. No. 1) The charge arises from Hirsch's testimony at a trial in March 2002, in which Hirsch was acquitted of two firearms charges. (See Doc. No. 138 in Case No. CR01-3024-MWB)

At trial, Hirsch testified that a particular GMC Jimmy vehicle in which a gun was found had been sitting idle on the property of David Vorland, Hirsch's co-defendant in the case, for "[a]pproximately two months" because "[t]he engine starter was out of it." (Trial Tr. p. 5¹) The Government contends Hirsch's testimony was false, claiming the evidence will show Hirsch drove the vehicle in question on the morning of the search that resulted in discovery of the gun in the vehicle.

Hirsch has filed a motion to dismiss the indictment on the following three grounds:

1. [Hirsch's] alleged perjurious statements cannot constitute a basis for perjury as they are either vague and unresponsive, or they were literally true.
2. [Hirsch's] alleged perjurious statements cannot constitute a basis for perjury as the alleged false declarations were not material to the issues in [Hirsch's] underlying trial on the gun charges.

¹References to "Trial Tr." refer to the transcript of Hirsch's trial testimony, which is attached to Hirsch's brief (Doc. No. 10) in support of his suppression motion.

3. The government has brought the charge of perjury against [Hirsch] for improper and unconstitutional reasons. Such selective and vindictive prosecution is prohibited by the Equal Protection clause in the 14th Amendment to the United States Constitution. This prosecution was pursued against [Hirsch] solely because [Hirsch] testified at his trial on the gun charges and the jury acquitted him of those charges. The government has failed to prosecute several other similarly situated individuals.

(Doc. No. 9, ¶¶ 1-3)

If the court fails to grant Hirsch's motion to dismiss the indictment, then Hirsch seeks discovery which he claims is necessary to prove his selective prosecution defense.

(*Id.*, ¶ 4)

The Government resists Hirsch's motion to dismiss on all grounds. The Government similarly resists the motion for discovery. The court will examine each of Hirsch's grounds for relief.

II. DISCUSSION

A. Truthfulness of the Statements

Hirsch claims his trial testimony cannot constitute perjury because his statements were vague, unresponsive or evasive, rendering the statements "literally true." (Doc. No. 10, p. 2) He argues further that the *Government's* questioning was fundamentally ambiguous.² The particular testimony at issue here is as follows:

²Hirsch erroneously claims the Assistant United States Attorney asked "the vague question . . . had that vehicle been at the Vorland property long." (Doc. No. 10, p. 3) The question was asked by Hirsch's own attorney on direct examination, with the prosecutor's follow-up questions being based directly upon Hirsch's response.

Q (By Mr. Tiefenthaler, representing Hirsch) With regards to the GMC Jimmy, had that vehicle been at the Vorland property long?

A (By Hirsch) Approximately two months.

Q Why is that?

A The – it didn't run. The engine starter was out of it.

(Trial Tr. p. 5) The prosecution's subsequent questioning on cross-examination relied on this testimony, with follow-up questions such as, "So what was your truck doing on the Vorland property all this time?", "So your testimony is you took it out there and dropped it off and it stayed there until [the officers] found it on May 18?", and "[I]t was parked there the whole time and wouldn't move?" (Trial Tr. p. 12)

Hirsch basically asks the court to find that his response, "Approximately two months," was so vague and evasive that it can be considered "literally true." The finding Hirsch asks the court to make is an element of the very crime with which Hirsch is charged in this case. The statute Hirsch is charged with violating proscribes, in pertinent part, the making of "any false material declaration," knowingly and under oath, "to any court or grand jury of the United States." 18 U.S.C. § 1623. Thus, the elements of the offense are (1) the making of a false statement to a court or grand jury, (2) knowing the statement is false, and (3) the statement is material.

To grant Hirsch's motion would require the court to step into the position of the jury, with whom the determination of guilt or innocence resides, and make a factual finding as to the first element of the offense. The jury, and not the court, is the fact-finder and must make this determination. *See, e.g., United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1997) ("The intended meaning of a question and answer are matters for the jury to decide.") "Absent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of declarant's answer is for the jury." *United States v. Robbins*, 997 F.2d 390, 395 (8th Cir. 1993) (citing *United States v. Wolfson*, 437 F.2d 862, 878 (2d Cir. 1970)).

Here, the question posed by Hirsch's counsel was clear and unambiguous. Hirsch's answer that the car had been at Vorland's property for "[a]pproximately two months" also was clear and unambiguous. The fact that Hirsch did not state an exact number of days the car had been on the property does not make his answer either unresponsive or misleading.

The court declines to usurp the jury's fact-finding role and finds no basis to grant Hirsch's motion to dismiss on this ground.

B. Materiality of Statements

Hirsch's second ground for relief is that his statements cannot constitute perjury because they were "not material to the issues" in his trial on the gun charges. No lengthy discussion is necessary to dispose of this claim because, once again, Hirsch asks the court to determine his guilt or innocence based on a factual element of the offense that must be decided by the jury at trial.

Hirsch cites several older cases in which the Eighth Circuit Court of Appeals held materiality was a question of law for the court's decision. Whether by design or simple error, Hirsch ignores more recent Supreme Court law to the contrary. In *United States v. Gaudin*, 515 U.S. 506, 522-23, 115 S. Ct. 2310, 2320, 132 L. Ed. 2d 444 (1995), the Court noted, "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." Thus, the Court held, "The trial judge's refusal to allow the jury to pass on the 'materiality' of [the defendant's] false statements infringed that right." *Id.*

In *Johnson v. United States*, 520 U.S. 461, 4665, 117 S. Ct. 1544, 1548, 137 L. Ed. 2d 718 (1997), the Court reiterated its position, holding "there is no doubt that materiality is an element of perjury under § 1623 . . . [and] *Gaudin* therefore dictates that materiality be decided by the jury, not the court." *Id.* Accord *United States v. Ferro*, 252 F.3d 964, 967-68 (8th Cir. 2001) (after *Gaudin*, "so long as the indictment contains a facially

sufficient allegation of materiality, federal criminal procedure does not ‘provide for a pre-trial determination of sufficiency of the evidence.’”); *United States v. Raether*, 82 F.3d 192, 193 (8th Cir. 1996) (question of materiality is for jury to decide).

Hirsch has presented nothing to persuade the court that his case is distinguishable from these binding precedents, and the court finds his motion to dismiss should be denied on this ground.

C. Selective Prosecution

Hirsch claims he is being selectively prosecuted because he testified at his own trial and was acquitted. He claims his prosecution arises “out of unconstitutional vindictiveness on the part of the government for failing to secure a guilty verdict at the underlying trial in this matter.” (Doc. No. 10, p. 10) Hirsch alleges “several defendants have testified at their own trial and have not been prosecuted for perjury.” (*Id.*) He offers the sentencing transcript of one specific individual who admitted, at sentencing, that she had perjured herself at her arraignment, yet she has not been prosecuted for perjury and, according to Hirsch, “seemed to have earned a substantial assistance motion from the government.” (*Id.*, pp. 10-11 & Exs. A & B) Hirsch argues the decision to prosecute him was in response to his exercise of his legal right to testify at his own trial.

Analysis of Hirsch’s argument begins with the prosecution’s “broad discretion when making charging decisions.” *United States v. Kriens*, 270 F.3d 597, 602 (8th Cir. 2001) (citing *United States v. Beede*, 974 F.2d 948, 952 (8th Cir. 1992)). Such discretion is not unlimited, however; prosecutors may not “base a decision to prosecute on ‘impermissible factors such as race, religion, or other arbitrary and unjustifiable classifications.’” *Id.* (citing *United States v. Jacobs*, 4 F.3d 603, 605 (8th Cir. 1993) (per curiam)). The *Kriens* court held:

[A] prosecutor may not pursue a prosecution out of vindictiveness or in response to a defendant's exercise of a legal right. *Beede*, 974 F.2d at 951. The burden is on the defendant to prove through objective evidence that the decision to prosecute or transfer prosecution was borne of a desire to punish him for the exercise of a legal right. *Id.* (citing *United States v. Goodwin*, 457 U.S. 368, 384 n.19, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)).

Kriens, 270 F.3d at 602.

Hirsch claims the legal right for which he is being punished by prosecution is his right to testify at his trial. He therefore claims the "protected class" of persons "similarly situated" to him consists of those defendants who choose to testify at trial and then are acquitted. Hirsch may prove his claim of vindictive prosecution in one of two ways:

First, a defendant may prove through objective evidence that the prosecutor's decision was intended to punish him or her for the exercise of a legal right. *See United States v. Goodwin*, 457 U.S. 368, 384 n.19, 102 S. Ct. 2485, 2494 n.19, 73 L. Ed. 2d 74 (1982). . . .

Second, a defendant may in certain circumstances rely on a presumption of vindictiveness.

United States v. Beede, 974 F.2d 948, 951 (8th Cir. 1992). Hirsch has produced no objective evidence to warrant dismissing the indictment on the basis of vindictive prosecution. He cannot benefit from the presumption of vindictiveness simply because the Government is prosecuting him following his acquittal. *See United States v. Arias*, 575 F.2d 253 (9th Cir. 1978) (rejecting similar claim). Without more, the court is inclined to accept the Government's assertion that Hirsch is being prosecuted not for taking the stand, but "for taking the stand and lying." (Doc. No. 12, p. 10)

Therefore, the court finds no basis to support Hirsch's motion to dismiss on this ground, and finds the motion should be denied.

III. MOTION FOR DISCOVERY

Hirsch seeks a large volume of discovery related to his selective prosecution claim.

He asks the court to order the Government:

- 1) to provide a list of all cases from the Northern District of Iowa over the last five years in which a defendant testified at trial;
- 2) to provide a list of whether the defendants who testified were found guilty or acquitted at trial;
- 3) to provide a list of all individuals charged with giving false declaration under oath pursuant to either 18 U.S.C.A. § 1623 or 18 U.S.C.A. § 1621, over the last five years, and the results of those prosecutions;
- 4) to identify what levels of law enforcement were involved in the investigations of those cases charged under either 18 U.S.C.A. § 1623 or 18 U.S.C.A. § 1621; and
- [5]) to explain its criteria for deciding to prosecute those defendants for false declaration under oath in violation of either 18 U.S.C.A. § 1623 or 18 U.S.C.A. § 1621.

(Doc. No. 9, pp. 2-3)

“Criminal defendants do not have a general constitutional right to discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). In most circumstances, then, a defendant must point to a statute, rule of criminal procedure, or other entitlement to obtain discovery from the government.” *United States v. Johnson*, 228 F.3d 920, 924 (8th Cir. 2000). In the present case, Hirsch entered into a Stipulated Discovery Order with the Government (Doc. No. 6), which requires the Government to make available for Hirsch’s inspection all evidence (with limited exceptions) forming the basis for the case against Hirsch. The discovery Hirsch seeks is, however, outside the scope of the discovery order. Hirsch has provided the court with little authority in support of his request for discovery, and the Government has provided no authority in opposition to the request.

The court therefore turns to Federal Rule of Civil Procedure 16 for guidance in considering Hirsch's requests. The Rule allows the court broad discretion in regulating discovery in criminal cases. In *United States v. Krauth*, 769 F.2d 473 (8th Cir. 1985), the court explained:

“‘An application for relief under the discovery rules . . . is a matter within the sound discretion of the district court and is reviewable only for an abuse of discretion.’” *United States v. Cole*, 453 F.2d 902, 904 (8th Cir. 1972), citing *Hemphill v. United States*, 392 F.2d 45, 48 (8th Cir.), *cert. denied*, 393 U.S. 877, 89 S. Ct. 176, 21 L. Ed. 2d 149 (1968).

769 F.2d at 476. The discovery Hirsch seeks in the present case would fall under subsection 16(a)(1)(C). As the *Krauth* court explained:

Fed. R. Crim. P. 16(a)(1)(C) allows the defendant to discover certain documents and tangible objects upon a showing that they are “material to the preparation of his defense.” A showing of materiality, however, is “not satisfied by a mere conclusory allegation that the requested information is material to the preparation of the defense.” *United States v. Conder*, 423 F.2d 904, 910 (6th Cir.), *cert. denied*, 400 U.S. 958, 91 S. Ct. 357, 27 L. Ed. 2d 267 (1970).

Id.

The court finds Hirsch has failed to make the requisite showing of materiality to obtain the requested discovery. The discovery he seeks is in the nature of a “fishing expedition” in the hope that he will uncover evidence to support his theory of defense. In particular, the “levels of law enforcement” involved in investigating perjury cases seems particularly irrelevant absent a substantial showing to the contrary.

Furthermore, the majority of the discovery Hirsch seeks could be gleaned from public records, and is equally available to Hirsch and the Government. The court will not order the Government to do Hirsch's discovery for him.

IV. CONCLUSION

For the reasons stated above, the motion for discovery is **denied**. On the issue of Hirsch's motion to dismiss the indictment, **IT IS RECOMMENDED**, unless any party files objections³ to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that the motion be **denied**.

IT IS SO ORDERED.

DATED this 24th day of October, 2002.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

³Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).